No. 48323-8-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

vs.

Coba Palmer, Jr.

Appellant.

Pierce County Superior Court Cause No. 14-1-04764-1

The Honorable Judge Michael E. Schwartz

Appellant's Opening Brief

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2. Mr. Palmer is constitutionally entitled to credit for all time served awaiting resolution of all charges under all applicable cause numbers.
3. The trial court violated Mr. Palmer's constitutional right to credit for time served by summarily denying his CrR 7.8 motion.

   ISSUE 1: A person who is unable to obtain pretrial release may not be confined for a longer period of time than a person who is able to obtain pretrial release. Did the sentencing court violate Mr. Palmer's Fourteenth Amendment rights to due process and equal protection by refusing to make clear that he was entitled to credit for all time served pending resolution of his charges?

4. The trial court erred by summarily denying Mr. Palmer's CrR 7.8 Motion, instead of either holding a hearing on the merits or transferring it to the Court of Appeals as a Personal Restraint Petition.

   ISSUE 2: Under CrR 7.8, a trial court may either order a show cause hearing or transfer a motion to the Court of Appeals. Did the trial court violate CrR 7.8 by summarily denying Mr. Palmer's CrR 7.8 motion instead of transferring it to the Court of Appeals?

5. The trial court erred by failing to meaningfully consider Mr. Palmer's request for credit for time served.

   ISSUE 3: A sentencing court has discretion to credit an offender for time served even when not served exclusively on the offense under sentence. Did the trial judge err by summarily denying Mr. Palmer's request for credit for time served against his concurrent sentences?

6. The Court of Appeals should decline to impose appellate costs, should Respondent substantially prevail and request such costs.

   ISSUE 4: If the state substantially prevails and makes a proper request for costs, should the Court of Appeals decline to impose appellate costs because Mr. Palmer is indigent?

STATEMENT OF FACTS AND PRIOR PROCEEDINGS

On July 27, 2015, Coba Palmer, Jr. was sentenced on several felony charges under two different cause numbers.[1] CP 4; RP (7/15/15) 3-5; RP (7/27/15) 3-4. The court imposed a total sentence of 63 months under each cause number, and ordered that the sentences run concurrently. RP (7/27/15) 3-4, 10; CP 26. Each judgment and sentence cited RCW 9.94A.505, and included boilerplate language that Mr. Palmer "shall receive credit for time served prior to sentencing if that confinement was solely under this cause number." CP 7, 26. At the hearing, the prosecutor indicated that Mr. Palmer would receive 245 days credit on one case and 6 days credit on the other case.[2] RP (7/27/15) 4.

In October of 2015, Mr. Palmer filed a pair of related CrR 7.8 motions. CP 35-41. He argued that he was entitled to 251 days credit (plus any accumulated good time) on both cause numbers, for the time he'd spent in the local jail awaiting resolution of his cases. CP 39. He asked the court to note the total credit for time served of 251 days (plus accrued good time), so that the Department of Corrections would credit the total against his sentence on each cause number. CP 39-40.

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[1] The other case was under cause no. 14-1-03795-5.

[2] The judgment and sentence does not reflect these figures. CP 19-32.

The court summarily denied the motion without a hearing, and without providing any reasons for its ruling. CP 42. Mr. Palmer timely appealed. CP 43.

ARGUMENT

I. MR. PALMER IS CONSTITUTIONALLY ENTITLED TO CREDIT FOR TIME SERVED WHILE AWAITING RESOLUTION OF MULTIPLE CHARGES.

Under the Fourteenth Amendment's due process and equal protection clauses, "a person unable to obtain pretrial release may not be confined for a longer period of time than a person able to obtain pretrial release." *State v. Lewis*, 184 Wn.2d 201, 205, 355 P.3d 1148 (2015). A person who receives concurrent sentences after being unable to make bail must be credited for pretrial time served on all charges. *Id.*

In this case, Mr. Palmer was indigent, and unable to make bail. CP 39. He remained in jail while awaiting resolution of this case and the companion case to which he ultimately pled guilty. RP (7/27/15) 4. He received concurrent sentences, and should have received "concurrent credit" for the total amount of time served. *Id.* Denying him credit for the 251 days he remained in custody prior to resolution of these cases violates his right to due process and equal protection. *Id.*

The trial court erred by refusing to credit Mr. Palmer with the time he served while awaiting resolution of his charges. *Id.* The lower court

decision must be reversed and the case remanded for entry of an order directing that Mr. Palmer be credited with 251 days of pretrial credit for time served, plus any accrued good time. *Id.*

II. IN THE ALTERNATIVE, THE TRIAL JUDGE SHOULD HAVE EXERCISED ITS DISCRETION AND PROPERLY CONSIDERED MR. PALMER'S REQUEST FOR CREDIT FOR TIME SERVED ON CONCURRENT SENTENCES.

In interpreting any statute, the court's duty is to "discern and implement the legislature's intent." *State v. Williams*, 171 Wn.2d 474, 477, 251 P.3d 877 (2011). The court's inquiry "always begins with the plain language of the statute." *State v. Christensen,* 153 Wn.2d 186, 194, 102 P.3d 789 (2004). This requires examination of the text of a statutory provision, the context of the statute in which it is found, related provisions, and the statutory scheme as a whole. *State v. Larson*, 184 Wn.2d 843, 848, 365 P.3d 740 (2015).

RCW 9.94A.505(6) addresses credit for time served at sentencing. The statute provides as follows:

> The sentencing court *shall* give the offender credit for all confinement time served before the sentencing if that confinement was solely in regard to the offense for which the offender is being sentenced.

RCW 9.94A.505(6) (emphasis added). By its plain terms, the statute *requires* the sentencing court to credit an offender for certain time previously served. RCW 9.94A.505(6).

The statute does not, however, restrict the sentencing court's discretion to award credit for time served when confinement is *not* "solely in regard to the offense for which the offender is being sentenced." RCW 9.94A.505(6).[3] Nor is there any other SRA provision that restricts a court's authority to order credit for time served when an offender has been confined for more than one offense. *See* Chapter 9.94A RCW.

In other words, the legislature has restricted a sentencing court's power to *deny* credit for time served, but not the court's power to *award* credit for time served.

Here, the prosecutor agreed to recommend concurrent sentences for both cause numbers, with credit for time served. CP 7. The court followed the agreed recommendation, imposing 63 months, ordering that the time on this case run "concurrent to 14-1-03795-5." CP 26.

However, the Judgment and Sentence also cited RCW 9.94A.505 and included boilerplate language that Mr. Palmer "shall receive credit for time served prior to sentencing if that confinement was solely under this cause number." CP 26.

The court's boilerplate order and its subsequent refusal to grant Mr. Palmer concurrent credit for time served reflect a misunderstanding of

[3] Indeed, if interpreted to prohibit credit for time served on multiple offenses, the statute violates equal protection and due process, as the *Lewis* court recognized. *Lewis*, 184 Wn.2d at 205.

the statutory provision. RCW 9.94A.505(6) restricts a judge's authority to *deny* credit. It does not restrict a judge's authority to *allow* credit.

The same error is reflected in several Court of Appeals opinions, relying primarily on *State v. Watson*, 63 Wn.App. 854, 859, 822 P.2d 327, 329 (1992). According to the *Watson* court, "[t]he SRA does not authorize giving credit for time being served on other sentences." *Id.*

This is incorrect. The SRA does not *require* "giving credit for time being served on other sentences." *Id.* It says nothing about what is *authorized*.[4]

The *Watson* court's error is based on a misreading of the statute and *State v. Williams*, 59 Wn.App. 379, 796 P.2d 1301 (1990). *See Watson*, 63 Wn.App. at 859 n. 15 (citing *Williams* II). In *Williams* II, the appellant "argue[d] that he [was] entitled to credit" for certain time served. *Williams* II, 59 Wn.App. at 381 (addressing former RCW 9.94A.120(12) (1990)). The *Williams* II court held that the appellant was not *entitled* to the credit he sought. The *Williams* II decision did not restrict a sentencing court's authority to award credit when imposing concurrent sentences.[5]

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[4] In addition, the *Watson* language does not address the issue of pretrial time for other offenses that have yet to be sentenced. In this case, Mr. Palmer was sentenced on the same day for both cause numbers. He was not already serving time "on other sentences." *Id.*

[5] The *Williams* II decision thus parallels the second issue addressed in *Lewis*. The defendant in *Lewis* argued that he was constitutionally entitled to credit for time served even after he began serving his sentence on another charge. The *Lewis* court found that the defendant was

(Continued)

The *Watson* court's error has been repeated without analysis in subsequent Court of Appeals decisions. *See, e.g., State v. Stewart*, 136 Wn.App. 162, 166, 149 P.3d 391 (2006); *State v. Harris*, 167 Wn.App. 340, 358, 272 P.3d 299 (2012); *State v. Davis*, 69 Wn.App. 634, 641, 849 P.2d 1283 (1993). *Watson* is both incorrect and harmful, and should be overturned. *See, e.g., Grisby v. Herzog*, 190 Wn.App. 786, 807, 362 P.3d 763, 773 (2015) (discussing principle of *stare decisis*).

A sentencing court has the authority to award credit for time served, regardless of the circumstances under which that time was earned. Here, the lower court failed to exercise its discretion.

Failure to exercise discretion is an abuse of discretion. *Amalgamated Transit Union Local No. 1576 v. Snohomish Cty. Pub. Transp. Ben. Area*, 178 Wn.App. 566, 577 n. 29, 316 P.3d 1103, 1109 (2013); *Bowcutt v. Delta N. Star Corp.*, 95 Wn.App. 311, 320, 976 P.2d 643, 648 (1999); *see also In re Mulholland*, 161 Wn.2d 322, 332, 166 P.3d 677, 683 (2007). By summarily denying Mr. Palmer's request for credit on this case, the trial court abused its discretion. *Amalgamated,* 178 Wn.App. at 577 n. 29.

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not constitutionally entitled to such credit; it did not hold that the trial court lacked authority to award such credit. *Lewis,* 184 Wn.2d at 205-206.

III. IF THE COURT OF APPEALS DOES NOT PROVIDE MR. PALMER RELIEF, IT MUST REMAND THE CASE TO THE TRIAL COURT FOR A PROPER RESOLUTION OF HIS CrR 7.8 MOTION.

CrR 7.8 sets forth the procedure for seeking relief following entry of a judgment and sentence. CrR 7.8(c)(2) is captioned "Transfer to Court of Appeals," and provides as follows:

> The court shall transfer a motion filed by a defendant to the Court of Appeals for consideration as a personal restraint petition unless the court determines that the motion is not barred by RCW 10.73.090 and either (i) the defendant has made a substantial showing that he or she is entitled to relief or (ii) resolution of the motion will require a factual hearing.

CrR 7.8(c)(3) is captioned "Order to Show Cause," and provides as follows:

> If the court does not transfer the motion to the Court of Appeals, it shall enter an order fixing a time and place for hearing and directing the adverse party to appear and show cause why the relief asked for should not be granted.

Under the plain language of the rule, the court does not have the authority to summarily deny a CrR 7.8 motion. Instead, the court must either transfer the motion to the Court of Appeals or enter a show cause order. *State v. Smith*, 144 Wn.App. 860, 864, 184 P.3d 666 (2008). Because the trial court's decision could impact future collateral proceedings, the proper remedy for a failure to follow CrR 7.8(c) is vacation of the court's order and remand. *Id.*

In this case, the trial court summarily denied Mr. Palmer's CrR 7.8 motion. CP 42. This was error. *Id.;* CrR 7.8(c). The court was required to either hold a show cause hearing or transfer the motion to the Court of Appeals. CrR 7.8(c). Its failure to do so was error.

Furthermore, if the trial court declines to hold a show cause hearing, it must nonetheless engage in a *meaningful* transfer analysis before sending the case to the Court of Appeals. *In re Ruiz-Sanabria*, 184 Wn.2d 632, 642, 362 P.3d 758, 762 (2015).

Accordingly, if the Court of Appeals does not grant Mr. palmer relief, it must remand the case to allow the trial court to properly exercise its authority under CrR 7.8(c). *Smith,* 144 Wn.App. at 864.

IV. IF THE STATE SUBSTANTIALLY PREVAILS, THE COURT OF APPEALS SHOULD DECLINE TO AWARD ANY APPELLATE COSTS REQUESTED.

At this point in the appellate process, the Court of Appeals has yet to issue a decision terminating review. Neither the state nor the appellant can be characterized as the substantially prevailing party. Nonetheless, the Court of Appeals has indicated that indigent appellants must object in advance to any cost bill that might eventually be filed by the state, should

it substantially prevail. *State v. Sinclair*, 192 Wn.App. 380, 385-394, 367 P.3d 612 (2016).[6]

Appellate costs are "indisputably" discretionary in nature. , *Id.*, at 388. The concerns identified by the Supreme Court in *Blazina* apply with equal force to this court's discretionary decisions on appellate costs. *State v. Blazina*, 182 Wn.2d 827, 344 P.3d 680 (2015).

Mr. Palmer is indigent. CP 48-49. There is no reason to conclude that status will change, especially given his numerous felony convictions and significant prison sentence. The *Blazina* court indicated that courts should "seriously question" the ability of a person who meets the GR 34 standard for indigency to pay discretionary legal financial obligations. *Id.* at 839

If the state substantially prevails on this appeal, this court should exercise its discretion to deny any appellate costs requested.

CONCLUSION

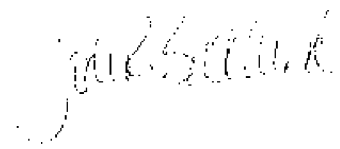
For the foregoing reasons, Mr. Palmer is constitutionally entitled to 251 days pretrial credit plus any accrued good time. In the alternative, the case must be remanded to the trial court to exercise its discretion to consider awarding Mr. Palmer such time. The court must either schedule a

[6] Division II's commissioner has indicated that Division II will follow *Sinclair*.

show cause hearing or transfer the case to the Court of Appeals as a Personal Restraint Petition.

Respectfully submitted on May 12, 2016,

BACKLUND AND MISTRY



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CERTIFICATE OF SERVICE

I certify that on today's date:

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With the permission of the recipient(s), I delivered an electronic version of the brief, using the Court's filing portal, to:

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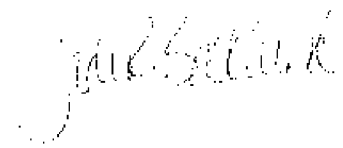
I filed the Appellant's Opening Brief electronically with the Court of Appeals, Division II, through the Court's online filing system.

I CERTIFY UNDER PENALTY OF PERJURY UNDER THE LAWS OF THE STATE OF WASHINGTON THAT THE FOREGOING IS TRUE AND CORRECT.

Signed at Olympia, Washington on May 12, 2016.



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